

1997

# Provo City Corporation v. William Patton : Brief of Appellee

Utah Court of Appeals

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Michael L. Humiston; counsel for appellant.

Christine M. Petersen; Provo City Attorney.

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PROVO CITY CORPORATION	:	
	:	
Plaintiff/Appellee,	:	Case No. 970489-CA
	:	
vs.	:	
	:	Priority No. 2
WILLIAM PATTON	:	
	:	
Defendant/Appellant	:	
	:	
	:	

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY,  
PROVO DEPARTMENT, FROM A CONVICTION OF A CLASS B MISDEMEANOR,  
BEFORE THE HONORABLE GARY D. STOTT

**FILED**  
Utah Court of Appeals

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Counsel for Appellee

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Plaintiff/Appellee,	:	Case No. 970489-CA
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Defendant/Appellant	:	
	:	
	:	

The Utah Court of Appeals has jurisdiction in this matter pursuant to § 78-2a-3(2)(f) of Utah Code Annotated (1953 as amended).

1. Whether Defendant was afforded sufficient discovery?
2. Whether testimony of alleged 'surprise witness' had a prejudicial impact on Appellant?

1

932, 935-36 (Utah 1994)). Conclusions of law, on the other hand are reviewed for correctness. See State v. Ramirez, 817 P.2d 774 (Utah 1991).

#### **CONTROLLING STATUTORY PROVISIONS**

Provo City Code § 14.34.080(3).

No trash, used materials, junk, household furniture, appliances, scrap material, equipment or parts thereof shall be stored in an open area. The accumulation of more than one (1) such item constitutes a junk yard as defined in chapter 14.06, Provo City Code and must be removed from the property, stored within an enclosed building, or be properly located in an M-2 zone.

#### **STATEMENT OF THE CASE**

Defendant William Patton and co-defendant, Joan Patton were served with summons on May 31, 1996, charging that on March 19, 1996, both defendants were in violation of Provo City Code §14.34.080, a Class B misdemeanor. On May 19, 1997, a bench trial before the Honorable Gary D. Stott resulted in the conviction of both defendants. Defendants were sentenced on June 23, 1997. Joan Patton filed a Notice of Appeal with the Fourth District Court the same day. On July 23, 1997, William Patton also filed a Notice of Appeal with the Fourth District Court, commencing this action.

#### **STATEMENT OF RELEVANT FACTS**

In November of 1995, Anthony Malloy came to work for Provo City as a zoning enforcement officer (Tr. at 7). Officer Malloy is assigned to a specific geographic area of Provo City (Tr. at

8). When officer Malloy was assigned to his area, he was given all the open files within that area (Tr. 8). Aside from clearing up the violations in the continuing files, officer Malloy is charged with addressing citizen complaints regarding zoning violations in his area (Tr. at 8).

One of the open files given to officer Malloy concerned Defendants' property (Tr. at 8). Defendants' have a history of zoning violations based on convictions for zoning violations in both 1990 and 1993 by two different judges (Sentencing Transcript at 8-9). In 1995, Provo City filed an order to show cause based on a continuing problem (Sentencing Transcript at 9-10). However, the notice was not filed in a timely manner and the Court's jurisdiction to extend Defendants' probation expired at the end of that year (Id). At this point, Officer Malloy was given the file and instructed to verify whether a continuing violation existed (Tr. at 8).

On or about February 23, 1996, officer Malloy visited defendants' property and confirmed the continuing existence of junk, trash, and other materials in the yard, in violation of Provo City Code §14-34-080 (Tr. at 8-9). Because defendants have a sign on their fence warning all local and federal agents to stay off the property, no personal contact was made with defendants (Tr. at 10). Instead, a letter was sent to defendants on February 23, 1996, requesting that they contact the zoning



office in order that compliance might be obtained (Tr. at 9-10).

On March 11, 1996, in response to the above letter, officer Malloy received a correspondence from defendant Joan Patton (Tr. at 13). While different issues were addressed in the letter, there was never an expression of willingness to comply with the zoning ordinance. A second notice to comply was sent to Defendants the same day (Tr. at 12). This time Defendants failed to respond altogether (Id). On March 19, 1996, officer Malloy returned to Defendants' residence to confirm the continued existence of the violation (Id). During this visit, officer Malloy was accompanied by another zoning officer, Roger Gonzalez. Officer Gonzalez took several photographs of Defendants' yard for the purpose of documenting the zoning violation (Id).

At trial, Defendants objected to the testimony of officer Gonzalez. According to testimony by Joan Patton, "I did not receive any discovery that Mr. Gonzalez was going to be a witness, therefore I have not had a chance to prepare" (Tr. at 63). All discovery in this case was conducted informally (Tr. at 65). At trial, Gary McGinn, attorney for Provo City, stated:

Joan Patton has come into my office several times. Our office has an open file policy. I believe Mr. Humiston, I believe also, has come in and asked for discovery. In our office if -- and to show them, in our file -- if they come in we'll allow them to look at the file, or we just make copies of everything that's in the file. We give everybody everything, there should be no secrets, that's our office policy and that's what we do.

With that, I know as Joan Patton has come in

several times, we do have a cover sheet. It has a list of our officers that says, "Anthony Malloy, Roger Gonzalez from the zoning department." Any time they come in and take a look that's there...

(Tr. at 64).

The Court denied the objection and allowed the testimony of officer Gonzalez (Tr. at 66). At the end of the trial, Defendants were convicted for violation of Provo City Code § 14.34.080(3). The Court described the basis of its decision in the following language:

In reading the statute and hearing the testimony that's been provided by Mr. Malloy and Mr. Gonzalez, which is the testimony we have, and the testimony of Mr. Keller that we had a rather dilapidated neighborhood in which the defendants' property complied in making it appear to be the same as the neighborhood in question, I find that the City has met its burden of proof concerning the second portion of that charging information in Count I, therefore I find the defendants guilty as charged.

From the plain and simple meaning of the ordinance, so you have your record on appeal, folks, I believe that the evidence has sufficiently demonstrated that there are items which consist of junk, stored trash, scraps of wood, deteriorated cardboard boxes, and even potential food products that looked like they had gone bad, from the witnesses testimony.

And with that testimony being the only testimony on the record, with nothing else to rebut it or to describe what it was, then the Court has only one conclusion to draw, and that is is it believable or is it not, and I find that the City has met its proof with respect to belief.

(Tr. at 115-116).

### SUMMARY OF THE ARGUMENT

The trial court did not err in convicting defendants for illegal storage of junk in violation of Provo City Code § 14.34.080(3). Defendants were afforded proper discovery in accordance with Plaintiff's standard open-file policy. Assuming arguendo that Plaintiff did fail to provide sufficient discovery, testimony from the alleged 'surprise witness' had no prejudicial impact on Defendant.

### ARGUMENT

#### THE TRIAL COURT DID NOT ERR IN CONVICTING DEFENDANT OF ILLEGAL STORAGE OF JUNK

##### A. Defendant was afforded **proper** discovery in accordance with Plaintiff's open file policy

Requests for discovery are governed by by Utah Rules of Criminal Procedure. According to Rule 16(a), the prosecution must, upon request, disclose to the defendant "material or information of which he has knowledge" as to any "item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense" (*Id.*).

In State v. Knight, 734 P.2d 913, 916 (Utah 1987), the Supreme Court of Utah held that the prosecution must respond to discovery requests in a manner which is not misleading. In order to achieve this end, the Court articulated two requirements that the prosecution must meet in responding to requests for

discovery:

First, the prosecution either must produce all of the material requested or must identify explicitly those portions of the request with respect to which no responsive material will be provided. Second, when the prosecution agrees to produce any of the material requested, it must continue to disclose such material on an ongoing basis to the defense.

*Id.*

In this case, the gravamen of Defendants' appeal is based on a claim that Provo City failed to provide sufficient discovery. Specifically, it is claimed that Plaintiff failed to provide Defendants with a witness list. The trial court rejected this claim due to the fact that the record contained no request for the identification of witnesses (Tr. at 65-66). Defendants concede that "the entire discovery process has been handled very informally" (Sentencing Transcript at 3).

This informality is an enormous benefit to defendants who are not currently required to petition the court or make formal written discovery requests to the City. Clearly, a more formal discovery process would inoculate the City from charges like those now brought by Defendants. Nevertheless, defendants, often appearing pro se, would hardly be served by the adoption of an oppressively formal discovery policy. In fact, under the City's current open-file policy, defendants have full access to all of the information possessed by the prosecution (Tr. at 64).

In this case, both defendant Joan Patton and Michael

Humiston, attorney for defendant William Patton, took the opportunity of visiting Plaintiff's office to review the file. The file contains the charging information as well as a cover sheet entitled *Provo City Attorney's Office Criminal Information Sheet*. This sheet has a heading entitled *Witnesses (Officers)*. Under that heading, the following is written: Anthony Malloy (zoning) and Roger Gonzalez (zoning). (Tr. at 64).

At trial, Defendant's attorney asserted the following: "[E]very document in this file was provided to me in discovery except the one that Mr. McGinn is referring to. This is the first we've heard about Mr. Gonzalez" (Tr. at 64-65). Despite this claim, the cover sheet in question would have been in the file. In fact, it is stapled to the rest of the charging documents. Only intentional removal by the City Attorneys office would explain the absence of the cover sheet. A far greater possibility is simple oversight on the part of Defendants and their counsel.

Even defendant Joan Patton does not allege deliberate subterfuge on the part of the City: "I personally did not feel that this one [omission] was done deliberately or maliciously, nor do I believe that the oversight was intention on the part of the Provo City prosecutor" (Sentencing Transcript at 5). Assuming arguendo that the cover sheet was mysteriously absent on those occasions in which defendants reviewed the file, there is

also mention of officer Gonzalez in another of the file's documents.

In a memorandum dated March 20, 1996 (from officer Molloy to Gary McGinn), officer Molloy states the following: "March 19, 1996, I went with Roger Gonzalez to the site and took the attached photos." Like the cover sheet, this memorandum was also a part of Defendant's file. This memorandum clearly indicates that officer Molloy was accompanied by officer Gonzalez to the *specific property in question on the day for which the zoning violation was charged*. Based on the informal nature of the discovery process, such a document alone should adequately place a defendant on notice. Interestingly, Defendants have failed to allege the absence of *this* document from the file to which they were given full access.

Defendants have simply failed to show that Provo City was derelict in its duty to provide reasonable discovery. In short, by giving Defendants unlimited access to the entire file, Plaintiffs fulfilled their duty to provide all materials requested. Pursuant to Plaintiff's standard open-file policy, Defendants were placed on notice that officer Gonzalez was a listed witness. Defendants have simply failed to establish that they were intentionally misled at any point during the discovery process.

**B. Testimony of alleged 'surprise witness' had no prejudicial impact on Defendant**

Even assuming arguendo that Provo City failed to provide adequate discovery, Defendants have failed to demonstrate that the introduction of testimony by officer Gonzalez was prejudicial to their case. Rule 30(a) of the Utah Rules of Criminal Procedure provides: "Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded."

Thus, the Court must engage in a two-prong analysis. First, it must determine whether the trial court erred in allowing officer Gonzalez's testimony. Only upon an affirmative response to the above question is further analysis necessary. If the Court finds the trial court was in error, it must then determine whether the error was sufficiently prejudicial to warrant reversal. State v. Carter, 707 P.2d 656, 662 (Utah 1985).

The Supreme Court of Utah has stated the following:

We have ruled in several cases that the Rule 30 phrase "affect the substantial rights of a party" means that an error warrants reversal "only if a review of the record persuades the court that without the error there was a *reasonable likelihood of a more favorable result for the defendant.*"

State v. Knight, 734 P.2d 913, 919 (Utah 1987) (citing State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984) (quoting State v. Hutchison, 655 P.2d 635, 637 (Utah 1982) (emphasis added))).

A 'reasonable likelihood' is only achieved when "the likelihood of a different outcome is sufficiently high as to

undermine our confidence in the verdict." Horrel v. Utah Farm Bureau Ins. Co., 909 P.2d 1279, 1282 (Utah App. 1996) (quoting Crookston v. Fire Ins. Exch., 817 P.2d 789, 796 (Utah 1991)). Even without officer Gonzalez's testimony, it is clear that defendants would have nevertheless been convicted in this case.

Defendants baldly assert that "all other evidence other than Mr. Gonzales' testimony was disregarded by the judge" (Defendants' Brief at 13). This statement is demonstrably false. In convicting Defendants, the trial judge specifically relied upon the testimony of all three witnesses, not just officer Gonzalez (Tr. at 115-116).

Next, Defendants assert the following: "The court found only that there was trash, specifically firewood, in the yard, and this was a matter that only Mr. Gonzales had testified to" (Defendants' Brief at 12). Again, this assertion is demonstrably false. To begin, the Court never found that *firewood* was present on the property. Rather, the court determined that *scraps of wood* were found on the property. (Tr. at 116).

Further, Defendants' claim that Mr. Gonzalez was the only person to testify concerning scrap wood in the yard is also demonstrably false. At various points during the trial, officer Molloy also testified that scrap wood was present on the front yard: "In the front yard there were lumber -- specific items that are listed in that section of the ordinance" (Tr. at 9);



"There were lumber and other debris. He had things that I would see as just being trash that I would remove from the lot, but I do not recall the specifics" (Tr. at 24).

Despite the above statements specifically referring to scrap wood, Defendants object to officer Molloy's inability to recall greater specifics. In fact, officer Molloy's recollection of scrap lumber in the front yard alone is enough to sustain a conviction for a violation of § 14.34.080(3). After all, scrap material is clearly listed as a prohibited item.

Plaintiff's in such cases can hardly be expected to produce itemized lists of trash and junk down to the last Twinkie wrapper. Nonetheless, in the instant case, officer Molloy's testimony was not limited to scrap wood. In fact, officer Molloy testified as to the existence of "lumber" (Tr. at 9), "debris" (Tr. at 24), "trash" (Tr. at 24), "junk" (Tr. at 47), "scrap material" (Tr. at 50), and "equipment or parts generally" (Tr. at 51). Most of the above items are specifically mentioned in the ordinance. As such, officer Molloy's testimony, as believed by the court, was more than sufficient in and of itself to warrant conviction.

It should be noted that officer Molloy's testimony was corroborated by Defendants' only witness, Brent Keller. While being questioned by Defendants, Mr. Keller offered the following:

The neighborhood -- quite frankly, it's not a neighborhood I would like to live in. There are

numerous trailers with junk in them, there are yards with piles of rock and debris. One house in particular stands out as I went through the neighborhood last Friday and again today, there's a carport full of cardboard boxes clear up to the ceiling. I couldn't even -- I imagine there were many dozens of these cardboard boxes, which is about four houses down from the Patton residence.

A house not too far away, a log house, the front yard is full of weeds. Many houses in the area are very similar. It's an older neighborhood, the houses aren't well kept, the yards aren't well kept, they are not the immaculate yards that I see in many of the other parts of Provo. That's how I describe the neighborhood.

Q. Is there a substantial difference between the defendant's property and the rest of the neighborhood?

A. Not that I noticed . . .

(Tr. at 93-94).

Apparently this testimony was offered in an attempt to show discriminatory enforcement of the zoning ordinances. According to Defense Counsel: "Our position is that it's an arbitrary (inaudible) that Mrs. Patton and Mr. Patton are being singled out for no apparent reason . . ." (Tr. at 96). This claim was summarily rejected by the Court (Tr. at 97-98). In fact, officer Molloy testified that Defendants' were not the only ones on the street charged with zoning violations (Tr. at 55). Further, officer Molloy testified the instant charges were precipitated by "several calls from concerned residents in regards to your property" (Tr. at 56-57).

Obviously, Mr. Keller's testimony was relied upon heavily by the trial court in deciding to convict (Tr. at 115). At

sentencing, the judge reiterated:

You folks called a Mr. Keller to testify for you as your witness, and Mr. Keller described the condition of the your property at the time in question, who was your witness, as being an eyesore. It was a terrible neighborhood, he said, and yours -- and the condition of your property was consistent with the way things look in general, it was bad. I mean he painted a picture for me that wasn't very pretty, certainly not acceptable.

(Sentencing Transcript at 16-17).

As pointed out in Defendants' brief, a number of factors must be considered in determining whether a witness' testimony is sufficiently prejudicial to require reversal Defendants' Brief at 13). Among those included are:

1. The importance of the witness to the prosecution's case;
2. Whether the testimony is cumulative;
3. The presence or absence of corroborating or contradicting testimony;
4. The extent of cross examination; and
5. The overall strength of the case.

(Defendants' Brief at 13) (citing State v. Jacques, 924 P.2d 898, 902 (Utah App. 1996) (citing State v. Hackford, 737 P.2d 200 (Utah 1987)).

In light of the facts present in this case, analysis of the above factors weighs in favor of affirming Defendants' conviction. First, it has been clearly established that sufficient evidence existed to warrant a conviction even without the testimony of Mr. Gonzalez. The testimony of Mr. Gonzalez was largely cumulative. The thrust of Mr. Gonzalez's testimony merely confirmed the existence of the "debris of wood and lumber

scraps that were laying around throughout the vicinity of the yard. . . ." (Tr. at 68).

The next factor to be considered is the presence or absence of corroborating or contradicting testimony. Defendants failed to introduce a scintilla of testimony that contradicted either the testimony of officer Molloy or officer Gonzalez. On the contrary, testimony from Defendants' only witness actually corroborated testimony offered by the prosecution witnesses.

Another factor to be considered is the extent of cross examination. Although Mr. Gonzalez was subjected to cross examination by Defendant's counsel, it is claimed that "[c]ross examination was limited by the element of surprise . . . ." (Defendants' Brief at 13). This claim is severely undermined by the simple fact that Mr. Gonzalez only testified as to the condition of Defendants' property on March 19, 1996. Such testimony hardly constitutes sandbagging. Surely, Defendants and counsel were adequately prepared to discuss the condition of the property on the very day of the charged offense.


Finally, the overall strength of the case must be considered. The prosecution's case was supported by every single witness presented to the trial court. Defendants failed to offer a single word of testimony in contradiction. While the prosecution offered specific testimony that the yard was out of compliance on the day in question, Defendants were relegated to

claiming discriminatory enforcement (Tr. at 96) and contesting the Constitutionality of the zoning ordinance. (Tr. at 110). In accordance with this stratagem, most of the cross examination of officer Molloy was focused on whether or not the Provo City Code adequately defines common words such as "junk" and "scrap material" (Tr. at 47-50).

#### CONCLUSION

The trial court did not abuse its discretion by allowing the testimony of officer Gonzalez. Defendants were given full access to the entire file in accordance with Plaintiff's open-file policy. Defendants should have thus been on notice that officer Gonzalez was a witness. Further, even if this court were to find error in the trial court's decision to allow officer Gonzalez to testify, his testimony was not sufficiently prejudicial to warrant reversal. Based on the foregoing arguments, Plaintiff moves that Defendants' conviction for illegal storage of junk in violation of Provo City Code § 14.34.080(3) be affirmed.

Dated this 17<sup>th</sup> day of March, 1998.

  
Christine M. Petersen  
Attorney for Respondent

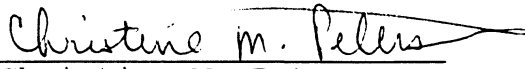
MAILING CERTIFICATE

I certify that two (2) true and correct copies of the foregoing Brief of Appellee were mailed to each of the following this 17<sup>th</sup> day of March, 1998:

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Christine M. Petersen

## ADDENDUM

1 basis in the zoning contacts?

2 A. I'd work with the zoning ordinance, the  
3 zoning map, other supporting documentation that Utah  
4 County has; building permits, Utah County ownership  
5 records.

6 Q. And how long did you work there?

7 A. Approximately six months.

8 Q. And then from there you've went to -- got  
9 employment with Provo City; is that correct?

10 A. That is correct.

11 Q. What type of materials in relation to zoning  
12 do you use on a daily basis for Provo City?

13 A. I use the zoning ordinance and the zoning  
14 map. We have a case file history of previous cases  
15 that we've worked with, also with building permit  
16 records and also the Utah County Recorder's Office  
17 information.

18 ~~Q.~~ What was the approximate date of when you  
19 came to work for Provo City?

20 A. It was in November of 1995.

21 Q. At that time when you came to work what  
22 duties were assigned to you?

23 A. In our office different areas are assigned  
24 to a specific zoning officer so that we can take care  
25 of specific areas and follow through with those cases.



1 I was assigned a specific area of Provo City.

2 Q. After you were assigned this specific area  
3 what did you do?

4 A. I was given several cases, and also we  
5 receive zoning complaints that are called in or people  
6 come into the counter, and we receive from those --  
7 that information we proceed to investigate whether  
8 there is any violation, and then I act on that kind of  
9 information.

10 Q. Were you given a file concerning the Patton  
11 property?

12 A. I was.

13 Q. What were your instructions with that file?

14 A. I was informed that I should proceed to go  
15 out into the field and verify that there was still a  
16 continuing violation. I did that, and there was a  
17 violation in my opinion at the site.

18 Q. What violation are you talking about?

19 A. ~~VIOLATION~~ Violation of Section 14-34-080, the  
20 accumulation of junk, trash and other materials in the  
21 yard.

22 Q. And you say you went to the site?

23 A. I did, I went out to the property.

24 Q. And what did you do when you arrived there?

25 A. I looked around the site to see if there

1       were materials that are specified in Section 14-34-030  
2       in the yard area. I did not go onto the site, I  
3       viewed the site from the public right-of-way. or the  
4       sidewalk.

5           Q.     At that point what types of materials did  
6       you see?

7           A.     I saw numerous materials that I don't recall  
8       specifics on. In the front yard area there were  
9       lumber -- specific items that are listed in that  
10      section of the ordinance. There was in addition a  
11      trailer in the front yard area that appeared to be  
12      inoperable, which is a violation of the city  
13      ordinance.

14                I also saw the fence that was on the front  
15      property line, and it was in excess of three feet in  
16      height, which is restricted by the city zoning  
17      ordinance.

18           Q.     Mr. Malloy, on what day approximately was  
19      this that you went out to the property for the first  
20      time?

21           A.     I have here a note that I did go to the site  
22      and sent the first letter out February 23, 1996.

23           Q.     So it was sometime around--

24           A.     Around that date, either that day or the day  
25      before the letter was sent to William and Joan Patton

1 I went to the site.

2 Q. Now you indicated you sent a letter. What  
3 is this letter, and when did the letter go out in  
4 relationship to your visit?

5 A. The letter went out on February 23rd. In  
6 that letter I informed the owners of the property the  
7 information I obtained from the Utah County Recorder's  
8 Office that the office had been contacted regarding a  
9 zoning violation, I had been to the site and verified  
10 the violation was in existence, and requested that  
11 they contact me in order that we can gain compliance  
12 for the zoning ordinance (inaudible).

13 Q. To whom was this letter sent?

14 A. It was to William and Joan Patton.

15 Q. And why did you send a letter to William and  
16 Joan Patton?

17 A. In some situations our office will contact  
18 the people physically at the site. In this situation  
19 I decided not to, since there is a notice posted on  
20 the fence to all local and federal agents to not enter  
21 the property.

22 Q. And so is that the reason you didn't attempt  
23 to make personal contact?

24 A. That's correct.

25 Q. What did the letter contain? What did you

1 March 11th I actually did receive a letter from Joan  
2 Patton. Different issues were addressed in the  
3 letter, but at no time did I receive the opinion they  
4 were willing to comply with the city zoning ordinance.

5 THE COURT: What was the date of the letter?

6 THE WITNESS: That was March 11, 1996.

7 THE COURT: Thank you.

8 MR. MCGINN: Your Honor, how would you like  
9 to do these? Do you want these marked individually,  
10 or group them together as A--

11 THE COURT: No, just mark them 1, 2, 3 et  
12 cetera. How many do you have?

13 MR. MCGINN: I don't know. I have--

14 THE COURT: Do you have dozens or have you  
15 got a few?

16 MR. MCGINN: I've got approximately 10.

17 THE COURT: Okay, mark them that way.

18 ~~MR.~~ MCGINN: Okay.

19 MR. MCGINN: Your Honor, I have shown these  
20 photographs to counsel. May I approach the witness?

21 THE COURT: You may. Have you shown them to  
22 Ms. Patton?

23 MR. MCGINN: Yes.

24 THE COURT: Okay.

25 Q. BY MR. MCGINN: Mr. Malloy, would you take a

1 here today when you're testifying, would you please  
2 just refer all your comments to the violation that  
3 exists on this lot, and violations on any other lot  
4 will be saved for another day?

5 A. I will.

6 Q. Thank you, would you please take the stand  
7 again.

8 (Witness resumes stand)

9 Now the lot at 1067 North 750 West, as what  
10 you've described on the board, showing a residence and  
11 a parking pad, correct?

12 A. It is.

13 Q. In that front yard area what types of  
14 materials did you see on that day that you felt were a  
15 violation of 14-34-080?

16 A. I do not recall specifics, but there were  
17 numerous violations on that lot. In addition to the  
18 ~~trailer~~ that is the most obvious or most apparent  
19 violation when you first look at the lot.

20 Q. Do you remember in general what types of  
21 materials were on that?

22 A. There were lumber and other debris. He had  
23 things that I would see as just being trash that I  
24 would remove from a lot, but I do not recall the  
25 specifics.

1 Mr. Humiston?

2 CROSS EXAMINATION

3 BY MR. HUMISTON:

4 Q. Mr. Malloy, starting from your most recent  
5 testimony, I understand that you say that you have  
6 received citizen complaints?

7 A. That is correct.

8 Q. You have personally received citizen  
9 complaints from neighbors?

10 A. I have spoken with neighbors or people who  
11 say they are neighbors during the process of this  
12 case, that is correct.

13 Q. Did you initiate the contact with those  
14 neighbors?

15 A. I did not.

16 Q. Have those complaints come in before or  
17 after we've last met at this court (inaudible)  
18 February (inaudible)?

19 A. I have received contact prior to that date  
20 and since that date with questions regarding what was  
21 going to happen, and that the yard is in -- needs some  
22 attention.

23 Q. Is it not true that you stated at that time  
24 in February that there had in fact been no citizen  
25 complaints?

1 property in December of 1994. The question is whether  
2 or not the property was in violation on March 19,  
3 1996.

4 MR. HUMISTON: May I approach?

5 THE COURT: You bet, you sure may.

6 Q. BY MS. PATTON: I would like to ask what the  
7 condition of the properties in the neighborhood that  
8 the defendant resides in, as you would have possibly  
9 seen this morning?

10 A. The neighborhood -- quite frankly, it's not  
11 a neighborhood I would like to live in. There are  
12 numerous trailers with junk in them, there are yards  
13 with piles of rocks and debris. One house in  
14 particular stands out as I went through the  
15 neighborhood last Friday and again today, there's a  
16 carport full of cardboard boxes clear up to the  
17 ceiling. I couldn't even -- I imagine there were many  
18 dozens of these cardboard boxes, which is about four  
19 houses ~~down~~ from the Patton residence.

20 A house not too far away, a log house, the  
21 front yard is full of weeds. Many houses in the area  
22 are very similar. It's an older neighborhood, the  
23 houses aren't well kept, the yards aren't well kept,  
24 they are not immaculate yards that I see in many of  
25 the other parts of Provo. That's how I'd describe the

1 neighborhood.

2 Q. Is there a substantial difference between  
3 the defendant's property and the rest of the  
4 neighborhood?

5 A. Not that I noticed, not unless you go out  
6 probably two blocks away to where a brand new  
7 apartment -- a large apartment complex has been built,  
8 and there the yards are very nice, the lawn is cut,  
9 watered regularly, looks quite nice, but once you get  
10 past that the houses, in my opinion, are not that  
11 different.

12 MS. PATTON: Just one moment, your Honor.  
13 Your Honor, I've never done this before, so may I  
14 approach Mr. Keller?

15 THE COURT: Let's have any photographs  
16 you've got marked as exhibits. You want to tell me  
17 when they were taken?

18 MS. PATTON: Yes.

19 THE COURT: Go ahead, tell me when they were  
20 taken.

21 MS. PATTON: Today, although the camera says  
22 (inaudible).

23 THE COURT: Can you tell me the relevancy of  
24 photos taken today? If you've cleaned it all up--

25 MS. PATTON: This isn't mine, this is--



1 the City is working on those. I just don't understand  
2 the relevance.

3 MR. HUMISTON: May I speak to that, your  
4 Honor?

5 THE COURT: Sure.

6 MR. HUMISTON: In Ms. Patton's cross  
7 examination of Mr. Malloy, there was substantial  
8 testimony that a lot of these determinations are  
9 subjective. We're dealing here basically with an  
10 administrative agent, Mr. Malloy, who makes subjective  
11 determinations.

12 Our position is that it's an arbitrary  
13 (inaudible) that Mrs. Patton and Mr. Patton are being  
14 singled out for no apparent reason, and this goes to  
15 the fact that this testimony would -- this evidence  
16 would (inaudible) numerous violations.

17 As far as whether any of these specific ones  
18 are being prosecuted, we would find that if Mr. Malloy  
19 cares to testify to that, but we're not aware of any.  
20 We are -- we think it's significant that there are  
21 numerous trailers on the street, numerous trailers  
22 that have been parked there for a long time, and as  
23 far as you can tell, the trailer seems to be the sole  
24 issue at this point.

25 MR. MCGINN: Objection to that. We're not

1 talking about any trailer on the street. We're  
2 talking about perhaps an inoperable vehicle in the  
3 front yard, or -- and/or we're talking about garbage,  
4 trash, junk, those types of materials in the front  
5 yard. That's what we're here about, we're not here  
6 about trailers in the streets, whether people have  
7 things parked--

8 MR. HUMISTON: Maybe we're arguing semantics  
9 here, but by on the street I mean other neighbors on  
10 the street, there are trailers in driveways, trailers  
11 in yards, junk in front of houses. We have evidence  
12 of all of that, and we are curious as to why the  
13 Pattons are being singled out when I think evidence  
14 would show, relative to some of these other houses,  
15 it's actually quite a bit cleaner.

16 MR. MCGINN: My contention is that there has  
17 been no showing of any evidence anywhere that the  
18 Pattons have been singled out. In cross examination I  
19 thought Officer Malloy said yes, there are other  
20 violations in the area that they're working on.

21 THE COURT: I don't have any evidence of  
22 discriminatory enforcement of the Provo City  
23 Ordinances. The fact that we may have a junky  
24 neighborhood and that the defendant's property  
25 complies with the junky neighborhood, making it junky,

1 too, doesn't tell me that that's discriminatory  
2 enforcement of the ordinance as to the defendants.

3 So we've got the testimony from this  
4 gentleman concerning what he's observed in the  
5 neighborhood, and that the defendants' property looks  
6 about the same as everybody else. I don't think we  
7 need anything else with respect to neighborhood  
8 description.

9 Count I sets forth the claimed violations of  
10 the defendants with respect to 14-34-080, and that's  
11 what we're -- we are going to proceed under that or  
12 we're not in terms of any finding of violation or no  
13 violation.

14 MR. HUMISTON: So are you sustaining the--

15 THE COURT: I'm sustaining the objection to  
16 the marking of photographs as exhibits to support the  
17 witness' testimony as to what the neighborhood looked  
18 like. That's what you wanted to do with them, that's  
19 what she said.

20 MR. HUMISTON: Yes.

21 THE COURT: Mrs. Patton, are you through  
22 with this gentleman?

23 MS. PATTON: I have no further questions for  
24 the witness as this time, your Honor.

25 THE COURT: Okay.

1       that in that neighborhood there are many houses with  
2       trash, garbage and other materials, and said that the  
3       Pattons' home fit the same pattern.

4               There were three witnesses, all three  
5       witnesses testified that there is trash and garbage in  
6       the yard, and two witnesses testified specifically  
7       that on March 19, 1996 there was trash and garbage.

8               Thank you, your Honor.

9               THE COURT: Thank you.

10              Ms. Patton?

11              MS. PATTON: For purposes of appeal, your  
12       Honor, I would like to have noted for the record my  
13       objection that both ordinances under Count I and II  
14       are arbitrary and (inaudible).

15              THE COURT: Well, Count II is dismissed.

16              MS. PATTON: Okay, then Count I.

17              THE COURT: Your objection is noted for the  
18       record, thank you.

19              MS. PATTON: Both ordinances under Count I  
20       violate the equal protection clause of the Utah  
21       Constitution under the 14th Amendment of the U. S.  
22       Constitution.

23              The prosecution has failed to prove that I  
24       have had the criminal intent necessary to violate the  
25       ordinances. If I lack the substantial understanding

1 anything else that you folks have. I'll let him speak  
2 and then I'll come back to you.

3 MR. HUMISTON: I'd just assume he speak  
4 first, if that's all right.

5 THE COURT: All right. Now let's go to my  
6 question. What do we have by way of compliance, and  
7 what request does the City have by way of sentencing?

8 MR. MCGINN: Yes, your Honor. As far as  
9 compliance, in the first case we had two charges, and  
10 we dismissed the (inaudible) case, as the Court will  
11 remember, because the problem where we have actually  
12 two lots rather than just the one, and we were  
13 focusing on 1067.

14 THE COURT: Count I was the one that had the  
15 conviction on it.

16 MR. MCGINN: Yes, and therefore we will just  
17 address the one lot. Your Honor, this, as my  
18 understanding is now, and the zoning officer can  
19 verify this, is the last time he went by that the  
20 problem with the storage of trash and junk materials  
21 in the front yard has been taken care of?

22 MR. MALLOY: Correct.

23 MR. MCGINN: At this point it has been taken  
24 care of. Your Honor, however in the past, there --  
25 this is the third case that we've had in court now

1 with this same issue on just the garbage and junk.  
2 Now there are other zoning violations out there, but I  
3 believe the Court indicated we should only be talking  
4 about the junk today.

5 In 1990 there was a conviction to trash  
6 storage in an open area, and the improper storage.  
7 Judge Dimmick at that time gave a fine of \$200 and 30  
8 days in jail suspended it all upon compliance, being  
9 cleaned up. At one point it was cleaned up, then  
10 again it became dirty and junky.

11 We've had another trial, this time from  
12 Judge Hansen in November of 1993. At that time Judge  
13 Hansen again heard evidence and found the defendant  
14 guilty.

15 At that time he imposed a sentence of \$1,000  
16 fine, 180 days in jail, again suspended everything,  
17 pursuant to a one year probationary period in which  
18 the defendant was to clean it up.

19 At that time as probation was drawing to a  
20 close, the City attempted to file an order to show  
21 cause to indicate that the problem was still there.  
22 The Court held a hearing, and in the end of 1995 the  
23 term then (inaudible) the Court's jurisdiction had  
24 expired, that the notice for the order to show cause  
25 had not been filed in a timely matter and notice was

1 not given to the defendant, and therefore the Court  
2 could not extend the probation.

3 So at that time is when the zoning officer  
4 was given a file to go out and follow up on this, and  
5 that brings us to where we are here today.

6 Your Honor, yes, it is clean at this time,  
7 but as you can see with the previous cases, it's a  
8 problem that it gets cleaned up, and then it happens  
9 again, and we have a cycle of cleaning up and it's  
10 not -- apparently not cleaned voluntarily, but it  
11 requires the City to file some sort of action and go  
12 in, and in the first case, even require to the point  
13 where the City had to go in and clean it up itself.

14 THE COURT: You'll have an opportunity, Ms.  
15 Patton.

16 MR. MCGINN: Based on that, your Honor, we  
17 would -- what the City is looking for is compliance in  
18 these cases. We don't want to see any people  
19 necessarily fined a lot of money or spend time in jail  
20 over something like this. We want to have a  
21 neighborhood and community that people are proud of,  
22 and we want it -- we believe that the zoning laws are  
23 there for a good reason.

24 In this case, unfortunately, we don't have a  
25 whole lot of voluntarily compliance. It's taken up a

1 piece of it ended up at the dump. It was all very  
2 high quality tools and equipment that was taken  
3 directly out of the carport and there were witnesses  
4 to the fact that it all ended up in the garages and  
5 carports of the city workers who took it.

6 That's a fairly drastic punishment that's  
7 already been imposed on prior occasions, and in light  
8 of that and, as I say, the Court's feeling that we've  
9 been here before. I feel that those things have been  
10 paid for as far as penalties sought by the City. This  
11 one should be addressed under its own merits. The  
12 City has said straight up that they wanted compliance  
13 and they have obtained compliance. Anything further  
14 beyond that basically amounts to overkill.

15 THE COURT: Thank you. Ms. Patton, and  
16 gentlemen, when I wrote on this pad I have no  
17 intention to babysit you folks, that's really what I  
18 feel. I don't -- by that, I'm not interested in the  
19 City running out to your home every 90 days and  
20 sending a report back to this Court to see if you've  
21 kept things like you should have.

22 You're adults, you ought to know by now  
23 what's acceptable and what's not acceptable. You  
24 folks called a Mr. Keller to testify for you as your  
25 witness, and Mr. Keller described the condition of



1     your property at the time in question, who was your  
2     witness, as being an eyesore. It was a terrible  
3     neighborhood, he said, and yours -- and the condition  
4     of your property was consistent with the way things  
5     look in general, it was bad. I mean he painted a  
6     picture for me that wasn't very pretty, certainly not  
7     acceptable.

8                 So my attitude is this. You've been found  
9     guilty of Count I, you've cleaned up the property  
10    which is now acceptable to the City and the zoning  
11    requirement, and that's what I'm interested in.

12                I'm going to impose the following sentence.  
13    With respect to Count I, a class B misdemeanor as to  
14    Joan Patton, I'm going to impose a sentence of \$500  
15    and 30 days in Utah County Jail.

16                I will suspend all of the fine and all of  
17    the time on the condition that the property remains in  
18    an acceptable condition, no further violation of the  
19    City for one year.

20                With respect to the case of Provo City vs.  
21    William Patton, I'm going to impose the same fine and  
22    the same penalty with respect to time, and will not --  
23    will stay the execution of both the sentence and the  
24    fine on the condition that the property remains in the  
25    condition it is now for a period of one year.